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Studien zum Aeltesten Familienrecht. Erster Teil: *Mutterrecht und Vaterrecht.* Erste Hälfte: *Die Grundlagen.* Von Dr. LOTHAR VON DARGUN, Professor an der Universität Krakau. Leipzig, Duncker & Humblot, 1892. — 8vo, 155 pp.

The material for the comparative study of legal evolution has become immense. The earliest conditions of civilized nations — or at least the conditions which apparently obtained before their civilization — have been elucidated by philological and institutional research, and the customs of uncivilized or semi-civilized tribes and peoples in all parts of the world have been more or less intelligently described by numerous observers. In the field of the family the material seems relatively complete. The more recent investigations have ceased to present any forms of family organization or systems of determining kinship that are really novel: they furnish us only with fresh examples of forms and systems already known. The time seems ripe, therefore, for more careful and profound study of the whole subject. This is the work undertaken by Professor von Dargun; and it is carried out in the first instalment of his treatise with unusual keenness of analysis and with interesting results.

In his view the differences of opinion still existing as to the primitive type of the human family and the successive stages of its evolution are due to the failure of most writers to distinguish between power and kinship. These authors who, like Letourneau and Starcke, discover in the lowest stages of social development a distinct supremacy of the man over wife and children deny the priority of mother-right or relationship through the female line. Those, again, who find clear traces of the general priority of mother-right deny the antiquity of the patriarchate. According to von Dargun, there is here a confusion of things which are indeed causally related, but which are nevertheless distinct; and a general agreement will certainly be attained as soon as the scientific world learns to separate power and kinship and to admit that paternal authority may exist without agnatic relationship, and mother-right without matriarchal developments.

Without denying or affirming the possible priority of hetairism or absolutely indiscriminate sexual relations, the author maintains that the earliest demonstrable organization of the family is about and under the man.

We picture to ourselves the protoplasm [*Urzelle*] of the family . . . as follows. Within the . . . horde [*Menschenrudel*] . . . smaller separate

groups are formed, the central point of which is usually a man. This man puts himself in possession of one or more women ; commands their services of whatever nature ; and disposes both of them and of the children borne by them, whether the latter are really his children or not. [Pp. 38, 39.]

But this power is not yet a true patriarchy. It is merely a *de facto* power. It exists only so long as it is exercised. If the man puts away his wife, his marital and paternal power is at an end. When the children grow strong enough to shift for themselves, they are no longer in any sense his children. They may even ignore their relationship to each other. The idea of kinship is of later development.

From this primitive power of the man, as it becomes more durable and hardens into the patriarchy, *may* proceed directly a theory of agnation or kinship through the male line. Or kinship *may* conceivably be recognized in both lines. But neither of these things commonly happens at the outset. Even where paternity is certain, which is far from being commonly the case, the bond of blood between mother and child is far more obvious to the primitive mind than is the bond between father and child. The earliest system of kinship is therefore almost always uterine. With the full development of this system there may appear matriarchal ideas and usages: rarely in the form of a real household authority of the granddame; more often in the form of a right of the mother's brother or her maternal uncle to protect her and her children against the husband and father. But exclusive mother-right, as a system of kinship, is demonstrably compatible with exclusive marital and paternal power.

But as the recognition of uterine kinship tends to produce matriarchal ideas, so conversely the exercise of paternal power tends to produce a new theory of kinship; and this latter tendency is far more energetic. Mother-right sporadically develops into patriarchy, but patriarchy, once firmly established, always tends to break down mother-right and to develop agnatic relationship. The patriarchal household is indeed based on power alone, and the actual paternity of the children is at first immaterial. But in proportion as marital authority becomes more complete and durable, paternity becomes more certain, and the new theory of kinship grows in importance. Men cease to say "The cock lays no eggs," and begin to use similes of the seed and the soil. Still, the paternal power and the new agnatic kinship remain essentially juristic conceptions. The father is father, not on physiological grounds, but because of his right over the mother. There is thus no immediate breach with the theories of mother-right, but rather a new departure from its recognized principles.

So far von Dargun. His theory is in itself plausible, and it is supported by a great array of evidence. But it seems incomplete. Why, we may ask, does father-right so often thrust mother-right partially or completely aside? How did the Romans, for example, come to adopt agnation as the exclusive system of legal kinship? Why have other peoples given preference to the male line in inheritance? These are the facts which von Dargun's explanations do not explain. From his presentation of the causes of father-right we should expect the immediate appearance of *Elternrecht* or the modern system of kinship, which attributes equal importance to the male and female lines of descent. Other writers have found the missing explanation in the influence of the *gens* or clan. As Post, for example, has pointed out, the clan is based on the theoretic unity of blood, while the family is regularly based on the union of different bloods. With its theory the clan cannot possibly recognize more than one kind of kinship, and its system must be either exclusive mother-right or exclusive father-right. It is therefore the clan that really determines kinship. Von Dargun hardly alludes to this most important theory. That he does not accept it, however, is indicated on page 45, where he clearly assumes that clan organization is not the cause but the result of family organization.

In tracing the evolution of the patriarchate and of father-right the author rightly lays much stress upon wife-purchase, but he draws what seems to be an untenable distinction between the legal results of wife-capture and wife-purchase. In his opinion wife-capture creates only a *de facto* power, while wife-purchase creates a legal right, first over the wife and secondarily over her offspring. This is a distinction which cannot have been felt in really primitive society. That authority over wife and children develops on the same lines with property right in general; that in fact marital and paternal rights are originally indistinguishable from other property rights,—this von Dargun himself recognizes. But simple appropriation, recognized and respected by the community, is the original basis of all property right; and it is only where some sort of property right is established that sale is conceivable. In the evolution of the family, wife-purchase from the girl's father implies that paternal rights are already recognized, for otherwise the father has nothing of which he can dispose. Von Dargun might indeed respond that he disposes of a *de facto* power; but a *de facto* power which is alienable is indistinguishable from a right. Paternal authority therefore antedates wife-purchase; and von Dargun's statement that wife-capture is not a direct cause

of father-right, but only prepares the way for it, is demonstrably illogical. The fact that *after* wife-purchase has become usual, wife-capture within the tribe does not establish paternal authority over the children, is perfectly intelligible: at this stage of social development wife-capture becomes a distinctly wrongful act which cannot create rights; it becomes wife-stealing. But this fact does not sustain the contention that wife-capture could not establish marital and paternal rights at a time when the mode of appropriation was regarded as right and honorable. Here as elsewhere the author's argument is incomplete because he has postponed, for the present, all discussion of endogamy and exogamy.

The book goes far to clarify the discussion of a number of very complicated and difficult questions, and its further instalments will be awaited with interest.

MUNROE SMITH.

Alt-Arisches Jus Civile. Erste Abtheilung. Von Dr. B. W. LEIST, Professor an der Universität zu Jena. Jena, Gustav Fischer, 1892. — 8vo, 531 pp.

Professor Leist has resumed, with somewhat tedious restatements and repetitions, the line of investigation pursued in his *Gräco-Italische Rechtsgeschichte* (1884) and his *Alt-Arisches Jus Gentium* (1889). His attempt is to reconstruct the common Aryan beginnings of all Indo-Germanic legal systems by a comparison of Hindu, Greek and Roman institutions, with occasional excursions into Armenian, Persian, Celtic and German usages and laws. The common Aryan basis, as he shows, is rather religious and moral than legal: it is the divinely ordained system which the Hindus called *dharma*, the Greeks *themis*, and the Latins *fas*. It is this common divine law which Professor Leist rather oddly calls *jus gentium*. The term *jus civile*, on the other hand, he uses in a strictly Roman sense, to designate the local systems of law which were worked out in the ancient city-states of Greece and Italy. *Aryan Civil Law* is therefore, according to his own theory, a misnomer, for the Aryans never had a common civil law. All that they had in common was a religious law, in which, however, were imbedded many germs of the various civil laws which were developed independently centuries after their separation into distinct nationalities.

The present work, which will embrace two more volumes, is primarily an attempt to reconstruct the Roman *fas*, of which our knowledge is unfortunately very scanty, by the aid of *dharma* and